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No. 97-1364

In The
Supreme Court of the United States
October Term, 1997

ROBERT S. SPRINGSTON
Petitioner,

v.

CONSOLIDATED RAIL CORPORATION, et al.;
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF

I. Introduction

Neither Conrail nor GM present any compelling basis to deny Springston's Petition. This Court is therefore urged to grant Springston's Petition and address the issue of whether state law tort claims for

lack of locomotive conspicuity devices are preempted.

II. **Argument**

First, and most interesting, both Conrail and GM concede that the Sixth Circuit's decision in this case conflicts with the decisions of at least one state court of last resort, namely Henry v. District Court of the Seventeenth Judicial District, 198 Mont. 8, 645 P. 2d 1350 (1982), and Runkle v. Burlington Northern R.R. Co., 188 Mont. 286, 613 P.2d 982 (1980). For example, at page 8 of its Brief, Conrail admits

> the holdings of the Montana cases in allowing alerting-light claims does [sic] conflict with the Sixth Circuit decision that those claims are preempted under LBIA . . ..

Likewise, GM concedes that the Montana Supreme Court "declined, 16 years ago, to find preemption of a conspicuity-equipment

claim".[1] (GM Brf. at 3) What GM tacitly admits is that Runkle and Henry are in conflict with the Sixth Circuit's decision in this case.

It has been demonstrated, then, that the Sixth Circuit's decision in this case is in direct conflict with one or more decisions of a state court of last resort. Hence, Springston has satisfied Rule 10(a) of Rules of the Supreme Court of the United States. Accordingly, the Court is urged to grant Springston's Petition for Writ of Certiorari.

Secondly, Conrail and GM's reliance on Napier v. Atlantic A.C.L.R. Co., 272 U.S. 605 (1926) is wholly misplaced. Napier is a decision based solely upon the LBIA. As shown previously, the LBIA has no connection or relevance to locomotive conspicuity

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[1]It is somewhat curious that GM would highlight the fact that the Montana Supreme Court decision is 16 years old, when GM has tethered its entire argument to the Napier decision, a 72-year-old decision.

issues. It is not, contrary to Conrail and GM's protestations, dispositive of any issue in this case. Locomotive conspicuity devices such as ditch lights, strobe lights, and oscillating lights were not in existence in the United States when the LBIA was drafted. These devices could not have even been considered by this Court in Napier. Consequently, Napier and its progeny are not pertinent to the issue before this Court, since Napier and its progeny are focused on railroad employee safety, not the safety of motorists approaching grade crossings. It comes as no surprise, then, that the Supreme Court of Montana did not address the LBIA and Napier when it held that state law tort claims for lack of conspicuity devices are not preempted, since Napier and the LBIA have no relevance to locomotive conspicuity issues.

Springston's state law tort claims are not affected by the LBIA or Napier. Instead,

Springston's claims are governed by the Federal Railroad Safety Authorization Act, 49 U.S.C. §§ 20101 et seq, and its predecessor, the Federal Railroad Safety Act, 45 U.S.C. §§ 421 et seq. Not only were these Acts the first to address locomotive conspicuity, they were the first to define it. Locomotive conspicuity entails

> the enhancement of day and night visibility of the front end unit of a train, considering in particular the visibility and perspective of a motor vehicle at a grade crossing. 49 U.S.C. § 20143(a).

This definition squarely addresses the issue before this Court. The LBIA and Napier have no such definition, and do not address anything close to this specific subject matter. Therefore, it is beyond dispute that the controlling authority for this issue is set forth in the FRSAA and FRSA. Under the

FRSAA and the FRSA, state law tort claims are not preempted unless and until the Secretary of Transportation has issued final rules on the use of ditch lights, strobe lights, and oscillating lights for locomotives. 49 U.S.C. § 20106; 45 U.S.C. § 434. Here again, Conrail concedes that final rules concerning the use of locomotive conspicuity devices were not issued by the Secretary until after Springston's collision, and after Judge Dowd awarded summary judgment on his claims concerning conspicuity devices. To reiterate, the collision occurred on June 2, 1991. Judge Dowd awarded summary judgment on July 5, 1994. Conrail admits on page 6 of its Brief, footnote 3, that no final rule, of any kind, was issued until March 6, 1996, being codified at 49 C.F.R. 229.133. It is clear that the rule making to which Conrail refers occurred years after the collision and award of summary judgment. Even then, Conrail incorrectly refers to 49 C.F.R.

229.133 as a final rule. The very title of 49 C.F.R. 229.133, "Interim Locomotive Conspicuity Measures - Auxiliary External Lights," contradicts Conrail's statement. Interim measures do not constitute final rule making. Conrail cites no legislation more recent than 49 C.F.R. 229.133. Thus, there has been no final rule making issued on this subject. Accordingly, the Sixth Circuit's decision in this case, rendered November 19, 1997, came at a time when the Secretary still had not issued final rule making concerning locomotive conspicuity devices. It must be concluded, then, that Springston's state law tort claims are not preempted by the FRSAA or FRSA.

GM, for its part, does not even address the relevant legislation concerning locomotive conspicuity. Instead, GM misses the mark by discussing regulations concerning headlight intensity for a locomotive, a matter wholly distinct from locomotive

conspicuity devices. Headlight intensity regulations do not appear in 49 C.F.R. 229.133, which deals with locomotive conspicuity. The reason is obvious - locomotive headlights do not enhance its visibility to a motorist approaching a crossing. Instead, a locomotive headlight enhances the train crew's ability to detect hazards ahead of it like washed out rail lines or track obstructions, but does not enhance the locomotive's conspicuity to a motorist approaching a grade crossing. This point was not lost on the Montana Supreme Court, which held

> "Congress has preempted the area of illumination devices, but not warning devices." Henry, 198 Mont. at 13, 645 P.2d at 1352.

The locomotive headlight, with all its candela, is an illumination device. It is not a warning device, nor was it ever intended to be. As such, GM's argument

concerning the locomotive headlight regulations in 49 C.F.R. 229.125(a) is completely inapposite to the issue before this Court.

III. Conclusion

Springston has demonstrated that the decision of the Sixth Circuit in this case is in conflict with the decision of a state court of last resort. Conrail and GM have not presented any compelling argument to the contrary. Accordingly, Springston respectfully asks this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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